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Supreme Court of the United States.

CHARLES C. PENNINGTON,
Plaintiff in Error,

against

THE FOURTH NATIONAL BANK, OF CINCINNATI, OHIO,
Defendant in Error.

Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

W. S. LITTLE,
Attorney for Defendant in Error.

C. B. WILBY,
Of Counsel for Defendant in Error.

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Supreme Court of the United States.

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Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

Clara M. Pennington, on September 4th, 1908, brought suit in the Common Pleas Court of Hamilton County, Ohio, against plaintiff in error, Charles C. Pennington, for divorce, alimony, custody of children and injunction, and she made the defendant in error, The Fourth National Bank, of Cincinnati, a party defendant.

On September 4th, 1908, the Fourth National Bank was served with summons, together with an order restraining it from paying out any money which it held belonging to plaintiff in error, except as ordered by the Court, which restraining order was afterwards made perpetual.

From time to time during the suit the defendant in error, the Fourth National Bank, by order of said Court of Common Pleas, paid from the money it held belonging to the plaintiff in error, the sum of five hundred and fifty dollars.

During the January term, 1909, of said Court of Common Pleas, a final decree was entered in said case ordering that the plaintiff in error, Charles C. Pennington, be forever divested of all and every claim, title or interest to the sum of fourteen hundred and forty-five dollars and seventeen cents held by defendant in error, the Fourth National Bank, for said Charles C. Pennington at the commencement of the suit, and that the Fourth National Bank pay the balance of said money to Clara M. Pennington, or to Eugene C. Pociey, her attorney, on account of alimony, maintenance of children and attorney's fees. The defendant in error paid out the balance of said money in accordance with said decree.

Plaintiff in error was not, at the time of the commencement of said suit, a resident of the state of Ohio; he was not personally served with summons, and he did not personally or by attorney, enter his appearance in said suit. Service was made upon him by publication, in accordance with the statutes in such cases made and provided.

Plaintiff in error is now seeking to recover the full amount of money deposited by him with the defendant in error and by the defendant in error paid out under order of court as aforesaid.

Plaintiff in error brought suit in the Superior Court of Cincinnati to recover from the defendant in error the full amount of money deposited by said plaintiff in error in said bank and by said bank paid out under orders of the Common Pleas Court of Hamilton County, Ohio. See petition, page 3 of the record.

Defendant in error filed its answer setting up facts substantially as above. See answer, page 4 of the record.

Plaintiff in error filed an amended reply to said answer. See amended reply, page 5 of the record.

Defendant in error demurred to said amended reply. See demurrer, page 6 of the record.

The Superior Court sustained the demurrer and rendered judgment for the defendant in error.

The Circuit Court affirmed the Superior Court; the Supreme Court of Ohio affirmed the judgment of the Circuit Court without report (see Journal Entry, page 16 of Record) upon the authority of *Benner* v. *Benner*, 63 O. S., 220, and *The Cleveland & Buffalo Transit Company* v. *Beeman*, 81 O. S., 509; and plaintiff in error is now seeking a reversal of the judgments of the lower courts.

THE QUESTION.

In a divorce suit in the state of Ohio, can money or a bank credit of a non-resident defendant be appropriated in payment of alimony, maintenance of minor children and costs, where the court at the commencement of said suit obtains control of said property by means of an injunction, and where the non-resident defendant is duly served by publication but is not personally served, and does not in any way enter his appearance in said suit?

THE LAW.

I.

WHERE DEFENDANT'S PROPERTY IS BROUGHT UNDER CONTROL OF THE COURT WHEN ACTION IS COMMENCED, A SUIT FOR ALIMONY TO THE EXTENT OF SAID PROPERTY IS SUBSTANTIALLY A SUIT IN REM.

Much space is taken up in many legal works in the attempt to define and distinguish between proceedings *in*

personam and proceedings *in rem*. The clearest and most concise statement which I am able to find concerning these proceedings is as follows:

> "The purpose of a proceeding *in personam*, is to impose, through the judgment or decree of the court whose aid is invoked, some responsibility or liability directly upon the person of the defendant. Of this character are criminal prosecutions, suits to compel a defendant to perform some specific act, or actions to fasten a general pecuniary liability upon him. A proceeding *in rem*, on the other hand, is aimed not at the person of the defendant, but at his property or some other thing within the power and jurisdiction of the court."
>
> *Minor on Conflict of Laws*, page 184, Section 85.

In the light of these definitions, was the decree now in question, granting alimony, maintenance of children and costs, a decree *in personam* or a decree *in rem?*

> "With regard to so much of the decree as relates to the costs of the suit and alimony of the wife it is to be observed that, so far as the court undertakes to decree against the defendant for a sum of money, the decree is a proceeding *in personam*. It seeks to fasten upon the defendant a general pecuniary liability. Hence, as in the case of other proceedings, *in personam*, no exterritorial force will be given the court's decree in this respect unless the defendant is within the court's jurisdiction, either by voluntary appearance or by personal service of process there. * * *
>
> "But if a defendant is a non-resident, it is proper, even upon an order of publication, without personal service or appearance, to provide for the seizure and appropriation of the defendant's property within the state, to make good the costs or alimony decree; for to the extent of the of the property thus seized the decree would cease

to be *in personam*, and would become a decree *in rem*. But any part of the personal liability imposed by the decree in excess of the value of such property, would still be *in personam* only, and must conform to the requirements for such proceedings, touching the notice to be given the defendant, or else it will be void both exterritorily and intra-territorily."

Minor on Conflict of Laws, page 207, Section 95.

The decree in question merely ordered the money or bank credit, then under control of the court, to be applied in payment of alimony and costs. It was then in view of the foregoing statement, a proceeding *in rem*. The rule that property of a non-resident may be seized and appropriated in an action *in rem* is well settled.

"Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have assented to in advance as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or effecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the state, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

Pennoyer v. *Neff*, 95 U. S., 714, at pages 733 and 734.

"So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident has no property in the state, there is nothing upon which the tribunals can adjudicate.

"These views are not new. They have been frequently expressed, with more or less distinctness,

in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus in *Picquet v. Swan*, 5 Mass., 35, Mr. Justice Story said:

"'Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principals, be deemed only to bind him to the extent of such property, and can not have the effect of a conclusive judgment in personam, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice*.'"

Pennoyer v. *Neff*, 95 U. S., 714, at 723.

I respectfully submit that the question involved in this case appears to be fully answered in Ohio by the case of

Benner v. *Benner*, 63 O. S., 220.

The syllabi of that case are as follows:

"1. Service by publication is authorized by Section 5048 of the Revised Statutes, in an action by a wife for alimony and support of her child against the husband who deserted his family and became a non-resident of the state, where the only relief sought is the appropriation of real property of the husband situated in the county where the action is brought to the payment of the amount that should be allowed for such alimony and support.

"2. Such an action is substantially one *in rem*, and the court has jurisdiction at its commence-

ment to grant a preliminary injunction preventing the disposition of the property by the defendant pending the suit, and, on completion of the service by publication to decree the relief sought."

A personal decree or judgment for alimony, based upon constructive service, is valid as against property of a non-resident husband, which may be found within the jurisdiction of the court, specifically proceeded against in the divorce proceeding, and described in the petition for divorce; and such a judgment or decree may be satisfied therefrom, such a proceeding being *in rem*.

Harshberger v. *Harshberger*, 26 Iowa, 503.
Twing v. *O'Meara*, 59 Iowa, 326.
Wesner v. *O'Brien*, 56 Kan., 724.
Thurston v. *Thurston*, 58 Minn., 279.
Bailey v. *Bailey*, 127 N. C., 474.

II.

Money Or a Bank Credit Can Be the Subject Of a Proceeding in Rem.

Plaintiff in error contends that money or a bank credit can not be made the subject of a proceeding *in rem* and in support of this proposition cites *Cross* v. *Armstrong*, 44 O. S., 613. Careful reading of that part of the opinion referred to in plaintiff's brief and of the second paragraph on page 626, shows that the court merely decided that an action *in personam* could not, by the mere act of paying money into court and of filing an interpleader bringing in a non-resident as a party defendant, be changed into an action *in rem*. It is nowhere decided in that case that money or a bank credit can not be a *res*. In that case the money or credit was not seized by the court at the begin-

ning of the action, nor did the court in any way attempt to control the same, and the original action was one *in personam* against the Insurance Company.

It is well settled by the case of *Pennoyer* v. *Neff, supra,* that an action *in personam* can not, after its commencement, be changed into an action *in rem,* and this is the only point decided by the Supreme Court of Ohio in the case of *Cross* v. *Armstrong, supra.*

Plaintiff in error also relies upon the fact that in all the cases cited the property appropriated to the payment of alimony and costs was real estate.

An action *in rem* means a suit against a thing, no matter what kind, so long as it is capable of being seized by or controlled under process of courts.

The proceeding in question in this case is similar to a proceeding in attachment on the ground of non-residence, and certainly no one will deny that personal property can be seized in attachment suits. No distinction has been drawn between personal and real property in such cases, and correspondingly none should be drawn in cases such as the one in question.

Mr. Justice Field in delivering the opinion in *Pennoyer* v. *Neff, supra,* says on page 723:

> "Every state owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens."

III.

Intangible Property Can Be Controlled By Injunction Against Its Custodian.

The Circuit Court of Cuyahoga County in *Cleveland & Buffalo Transit Company* v. *Kathryn L. Beeman,* and five

other cases (12 Ohio Circuit Court Reports [New Series], 460), affirmed by the Supreme Court of Ohio without report (on authority of *Benner* v. *Benner*, 63 Ohio State, 220), 81 Ohio State, 509, hold that:

> "1. An injunction against a custodian of intangible property gives to the court such control of the property as authorizes a decree transferring the title from the owner of the property before the injunction issued to another party to the suit who has been duly served with summons.
>
> "2. In an action by a wife for alimony, the fact that the husband was served by publication only does not render invalid an order awarding to the wife stocks in corporations for profit which have been brought into the action as defendants and enjoined against a transfer of the stock."

The court, Marvin, J., deciding the case said:

> "This case (No. 4258), together with the cases following up to and including number 4263, all raise the same questions and the determination of one is the determination of all.
>
> "Suit was brought in the Court of Common Pleas by Kathryn L. Beeman against her husband, Lester A. Beeman, for a divorce and alimony. Later, the prayer for divorce was abandoned and the case prosecuted for alimony alone. The defendant in that action, Lester A. Beeman, was a nonresident of the state of Ohio at the time the action was begun, and the only service had upon him was the constructive service by publication as provided for in the statute.
>
> "Each of the several plaintiffs in error in these cases is a corporation for profit. When the suit was begun in the Court of Common Pleas, Lester A. Beeman was a stockholder in each of these corporations, and each of the corporations was made a defendant in that action, and each was served with summons.

"On the motion of the plaintiff in that action a restraining order was allowed against each of these corporations, forbidding the transfer of any of the stock standing in the name of Lester A. Beeman, on their books, to any person. Upon final hearing the court awarded all of the stock standing in the name of Lester A. Beeman in these several corporations to Kathryn L. Beeman, as alimony, and ordered each of said corporations to deliver to the said Kathryn L. Beeman the original certificatees for such stock, and in case of the inability of said corporations, or any one of them, or the refusal of any one of them to deliver such certificates, that the decree of the court should operate as a conveyance of the several shares of stock in each of the corporations to the said Kathryn L. Beeman. To this judgment and order of the court error is prosecuted here, and a carefully prepared brief is furnished in behalf of the several plaintiffs in error, contending that the judgment was erroneous, and giving many plausible reasons for such contention. But whatever doubt might exist in our minds (were it not for the case of *Benner* v. *Benner*, 63 Ohio St., 220), is resolved by the judgment in that case in favor of the defendant in error.

"The argument in brief on behalf of the plaintiff in error is that as no personal service was made upon the defendant, Lester A. Beeman, no personal judgment could be rendered against him for alimony, and that the only way in which, in such case, his property could be reached is by such proceedings as puts the property in the custody of the court, and makes the case to that extent a proceeding *in rem* only, and that an injunction allowed against the custodian of such property (for the several corporations are the custodians of the stock of the several stockholders, see *Bank* v. *Towle Mfg. Co.*, 67 Ohio St., 306), is not such tak-

ing of the property by the court as will authorize a decree that the ownership of the property be transferred from the owner of said stock before the injunction, to another party in the suit.

"In the case of *Benner* v. *Benner, supra,* nothing was done to take the property of the defendant in that action into the custody of the court except the allowance of an injunction against the defendant prohibiting him from disposing of his property. The defendant in that action was a non-resident and there was no service other than constructive service by publication upon him. No injunction was allowed against anybody but him. True, the property there was real estate situated within the jurisdiction of the court. Here the property is intangible, but it has a situs and that situs is where the custodian of the property is, to-wit, the corporation. See the opinion in *Bank* v. *Mfg. Co.*, 67 Ohio St., 314, *supra.*

"The distinction between the case of *Benner* v. *Benner, supra,* and the present case, sought to be shown in the brief of plaintiffs in error, fails to convince us that the principle in that case must not apply to this. Indeed, the reason for its application here seems stronger than its application in that case, for each of parties here enjoined by the order of the court was actually served with summons in the action, while the property was in the possession and under the control of the corporations and we reach the conclusion, therefore, that the judgment of the Court of Common Pleas was right and in each case of the several cases the judgment is affirmed."

In the case at bar the Common Pleas Court by injunction, issued at the commencement of the action, obtained control over the money or deposit in The Fourth National Bank. The action from its inception was one *in rem*, and no attempt was made by the court to establish a general pecuniary liability upon the plaintiff.

The decree of the court was valid under the rule laid down in the case of *Pennoyer v. Neff, supra,* and was in accordance with the decisions of our own Supreme Court in

Benner v. Benner, 63 O. S., 220.
Transit Co. v. *Beeman,* 12 O.C.C.(N.S.), 460 (affirmed, 81 O. S., 509).

IV.

Analysis of Citations in Brief of Plaintiff in Error.

In the brief of plaintiff in error, filed herein, a number of citations are made which consist of extracts from text books and reports. In two cases these extracts are followed in the original by statements which materially qualify them. The following is quoted from plaintiff's brief:

> "The obligation of a husband to support his wife is personal, and therefore a decree of alimony against a non-resident defendant is *in personam* and void, unless he has appeared, either in person or by attorney, or has been personally served with process within the territorial jurisdiction of the court."
>
> 14 Cyc., 745.

In the original, the next sentence after the above, and in the same paragraph, reads as follows:

> "It has been held, however, that property within the jurisdiction of the court may be subjected to a decree granting alimony against a non-resident defendant who has been constructively served with process in a divorce suit."

Then again, we find the following quotation in plaintiff's brief:

> "That the decree in the divorce suit, in so far as it purported to be a personal decree against the defendant for alimony and costs, is void, can admit of no doubt. In the absence of personal service upon the defendant within the jurisdiction of the court, no court has power to render a judgment *in personam* which can be the subject of an action or the basis of an execution. To render a valid judgment, a court must obtain jurisdiction either of the person or property of the defendant within its jurisdiction."
>
> *Bunnell* v. *Bunnell*, 25 Federal Reports, 216.

which in turn is followed in the same paragraph in the original by the following:

> "If the jurisdiction of the person be obtained by personal service of process, the judgment will be valid the world over. If jurisdiction be obtained by seizure of property the judgment will be valid only as it respects that property, and within the jurisdiction of the court rendering it."

In brief of plaintiff in error an attempt is made to distinguish between the action out of which this case grew and a proceeding in attachment for the satisfaction of a debt. It is said that in the case of a proceeding in attachment, a debt must exist or be claimed to exist. However, in a proceeding in attachment, the court must, after the attachment is made, find that the debt does exist and fix the amount, before it can order the defendant's property appropriated to its satisfaction. In a suit for divorce and alimony brought by a wife, the allegations setting forth the marriage contract necessarily show a right on the part of the wife and children to be supported by the husband

and the court in determining a wife's right to said support and in fixing the amount of alimony, is doing no more than the court does in an attachment case, when it finds that there is a debt and fixes its amount. In either case, if the defendant is not personally served or does not enter his appearance, the judgment of the courts is only binding to the extent of the property of the defendant which was under the control of the court from the beginning of the action.

It is said that the bank credit with which we are concerned in this case had no situs and, therefore, could not be the subject of a proceeding *in rem*. So far as the defendant in error was concerned this bank credit was a debt owned by it to the plaintiff in error and as such was subject to the law in regard to the situs of debts. Upon this subject Mr. Justice McKenna, speaking for the Court, said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney* v. *Buford & George Mfg. Co.*, 72 Fed. Rep., 32; Conflict of Laws, §549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistance upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Chicago, Rock Island & Pacific Railway Company v. Sturm, 174 U. S., 710, at pages 715 and 716.

For a very logical discussion of the subject of the situs of debts the Court is referred to *Minor on Conflict of Laws*, Section 125.

I respectfully submit that the judgments of the Superior Court of Cincinnati, the Circuit Court of Hamilton County, and the Supreme Court of Ohio, be affirmed.

Respectfully submitted,

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